

John G. McCarthy (JM-2635)  
 BAINTON McCARTHY LLC  
 Attorneys for Plaintiff  
 English Boiler & Tube Inc.  
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 New York, New York 10004  
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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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ENGLISH BOILER & TUBE, INC.,	:	08 Civ. 3605 (JGK)
	:	ECF Case
Plaintiff,	:	
	:	<b>DECLARATION OF JOHN G.</b>
- against -	:	<b>McCARTHY IN SUPPORT OF</b>
	:	<b>APPLICATION FOR</b>
OPTIMIRA ENERGY, INC.,	:	<b>JUDGMENT BY DEFAULT AND</b>
	:	<b>BILL OF COSTS</b>
Defendant.	:	
-----X		

JOHN G. McCARTHY, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of the bar of this Court and the firm of Bainton McCarthy LLC, attorneys for Plaintiff English Boiler & Tube, Inc. ("English Boiler") in the above-entitled action. As such, I am familiar with the facts and circumstances in this action.

2. I make this declaration pursuant to Civil Rules 55.1 and 55.2(a) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, in support of English Boiler's application for the entry of a default judgment against defendant.

3. This is an action to recover \$145,000.00 owed by defendant to English Boiler for breach of contract and unjust enrichment.

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 and the holding in *Neumann v. Iovino*, 06 Civ. 11367 (DC), 2007 U.S. Dist LEXIS 50374 (S.D.N.Y. July 11, 2007). Venue is proper in this district pursuant to 28 U.S.C. §

1391. Moreover, the agreement at issue in this lawsuit designates this Court as the forum for any lawsuit involving it.

5. English Boiler is a citizen of the Commonwealth of Virginia as it is incorporated and has its principal place of business in Virginia.

6. According to the records of the New York Secretary of State, defendant Optimira Energy, Inc. (“Optimira”) is a corporation organized under the laws of the State of Delaware, maintains its principal place of business in New York, New York and is licensed to do business in New York.

7. Optimira is neither a minor nor an incompetent person.

8. This Court has personal jurisdiction over Optimira pursuant to CPLR 301.

9. Service was effectuated on Optimira and it failed to respond to the Complaint.

10. On May 29, 2008, the Clerk entered a certificate of default against Optimira. A true and correct copy of the Clerk’s certificate is attached hereto as Exhibit A.

11. English Boiler proposes a total award of \$149,109.04, which is justly due and owing, and no part of which has been paid. The proposed total is subdivided as follows:

- a. On its breach of contract claim, \$45,000, plus \$2,674.11 in prejudgment interest since October 1, 2007;
- b. On its unjust enrichment claim, \$100,000, plus \$1,084.93 in prejudgment interest since the complaint was filed on April 15, 2008; and
- c. \$350.00 in costs for filing fees, as set forth on the accompanying bill of costs.

12. The prejudgment interest on English Boiler’s actual damages is \$3,759.04. CPLR 5001 permits the award of prejudgment interest in actions for breach of contract and

unjust enrichment. *Valjean Mfg. v. Michael Werdiger, Inc.*, 05-0939-cv, 2007 U.S. App. LEXIS 20475 (2d Cir. Aug. 27, 2007); *Campbell v. Metropolitan Prop. & Cas. Ins. Co.*, 239 F.3d 179, 186 (2d Cir. 2001). CPLR 5004 provides a legal rate of nine percent per annum. This rate is calculated as simple interest.

13. English Boiler is also entitled to costs in the amount of \$350.00 for the filing fee to commence this action. *See* Local Civ. R. 54.1. A bill of costs is being submitted herewith. A true and correct copy of the receipt issued by the Clerk for the filing fee is attached hereto as Exhibit B.

14. The following table summarizes the prejudgment interest amounts that have accrued to date from the date Optimira should have made payments to English Boiler:

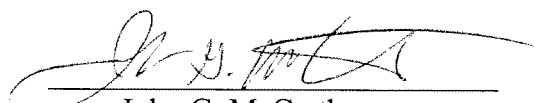
Payment Day	Aging (Days)	Total Principal	Daily Interest	Prejudgment Interest
10/1/2007	241	\$45,000.00	\$11.10	\$2,674.11
4/15/2008	44	\$100,000.00	\$24.66	\$1,084.93
<b>\$145,000.00</b>				<b>\$3,759.04</b>

15. Prejudgment interest continues to accrue in the daily amount of \$35.76 until judgment is entered.

16. For the foregoing reasons, the Court should enter a default judgment against Optimira for \$149,109.04.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 2008.

  
John G. McCarthy

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
ENGLISH BOILER & TUBE, INC., :  
 : 08 Civ. 3605 (JGK)  
Plaintiff, : ECF Case  
 :  
- against - : **CLERK'S CERTIFICATE**  
 : **OF DEFAULT**  
OPTIMIRA ENERGY, INC., :  
 :  
Defendant. :  
-----X

I, J. MICHAEL McMAHON, Clerk of the United States District Court for the Southern District of New York, do hereby certify that this action commenced on April 15, 2008 with the filing of a summons and complaint, a copy of the summons and complaint was served on defendant on April 16, 2008 by serving registered agent CT Corporation System, Sattie Jairaf, process inspector, by hand delivery at 111 8<sup>th</sup> Avenue, New York, New York, and proof of such service thereof was filed on May 8, 2008.

I further certify that the docket entries indicate that the defendant has not filed an answer or otherwise moved with respect to the complaint herein. The default of the defendant Optimira Energy, Inc. is hereby noted.

Dated: New York, New York  
May 22, 2008

**J. MICHAEL McMAHON**  
Clerk of the Court

By:           *LM*            
Deputy Clerk

ORIGINAL-WHITE

DUPLICATE-YELLOW

TRIPPLICATE-PINK

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT

for the  
SOUTHERN DISTRICT OF NEW YORK

E 647661

RECEIVED FROM

*Bennett McCarthy*  
at  
*08013605 (Cik)*

Fund

6855XX  
604700

Deposit Funds

Registry Funds

General and Special Funds

508800

Immigration Fees

085000

Attorney Admission Fees

086900

Filing Fees

322340

Sale of Publications

322350

Copy Fees

322360

Miscellaneous Fees

143500

Interest

322380

Recoveries of Court Costs

322386

Restitution to U.S. Government

121000

Conscience Fund

129900

Gifts

504100

Crime Victims Fund

613300

Unclaimed Monies

510000

Civil Filing Fee (1/2)

510100

Registry Fee

Checks and drafts are accepted subject to collection and full credit will only be given when the check or draft has been accepted by the financial institution on which it was drawn.

DEPUTY CLERK:

DATE:

Cash Check M.O. Credit

20

*[Signature]*